



STATE OF ARIZONA

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**VIA FEDERAL EXPRESS**

Hon. Alberto R. Gonzales  
Attorney General of the United States  
United States Department of Justice  
950 Pennsylvania Avenue, N.W.  
Washington, D.C. 20530

Dear Attorney General Gonzales:

Congratulations on your confirmation today as Attorney General. As you begin to look at pressing issues, I would like to call your attention to the October 21, 2004 letter I wrote to Attorney General Ashcroft relating to the State Criminal Alien Assistance Program ("SCAAP"), an issue with which you are probably familiar, given your work as General Counsel to President Bush when he was the Governor of Texas.

By way of background, as you may recall, 8 U.S.C. § 1231(i)(2), requires the Attorney General to either "enter into a contractual agreement which provides for compensation to the State . . . with respect to the incarceration of the undocumented criminal alien; or . . . take the undocumented criminal alien into the custody of the Federal Government and incarcerate the alien." If the Attorney General elects to compensate the State, 8 U.S.C. § 1231(i)(2) requires the Attorney General to determine the compensation based on the "average cost of incarceration of a prisoner in the relevant State." The statute also requires the Attorney General to enter into a contractual agreement with the State for the compensation, upon written request from the State's Chief Executive Officer.

In Arizona, as elsewhere, however, and for every year since SCAAP came into existence, the Attorney General has simply paid our State Department of Corrections a lump sum, on a "take it or leave it" basis. That lump sum bears no relationship whatsoever to the State's actual average costs of incarcerating criminal aliens; in fact, it is far below those costs. For example, last year, Arizona housed a total of 4,743 criminal aliens and had an average daily population of 3,642 inmates eligible for SCAAP payments. Our actual cost of incarcerating inmates is \$53.44 per day. Accordingly, we

should have been entitled to \$71,039,395 in SCAAP funding pursuant to the following basic formula:

<u>Avg. Daily SCAAP population</u>		<u>Per diem cost</u>		<u>No. days</u>		<u>Amt. Due</u>
3,642	x	\$53.44	x	365	=	\$71,039,395

In fact, however, Arizona was reimbursed only \$6,808,219, or \$64,231,176 less than its actual costs.

As I made clear in my October 21, 2004 letter, although the Attorney General has never complied with the law's requirement to reimburse the State's actual average costs, the situation has worsened in recent years. DOJ now reimburses Arizona fewer than ten cents of every dollar of state tax money spent on incarcerating criminal aliens. In addition, SCAAP's limited funds have been distributed pursuant to an internet-submitted DOJ form, without a review of actual incarceration costs, and without the required contractual agreement with the Chief Executive Office of Arizona, or (to our knowledge) any other state.

On December 16, 2004, my office received a letter dated December 6, 2004 from Domingo Herraiz, Director of the Justice Department's Bureau of Justice Assistance, responding to my October 21, 2004 letter to Attorney General Ashcroft. Mr. Herraiz does not dispute that the State of Arizona has received far less than its actual average per inmate costs for housing criminal aliens.

Mr. Herraiz's letter makes clear that this underpayment is the result of several factors. First, as his letter concedes, Congress grossly underfunded SCAAP so that DOJ paid states only 42.16 % of the costs that even the DOJ agrees they incurred. I am hopeful that Congress and the Administration will properly fund SCAAP this year and that you will join me in supporting the bill sponsored by Senators Feinstein, Kyl, McCain and others to better fund SCAAP in the coming years.

Second, DOJ significantly understated the number of criminal aliens in Arizona's system. DOJ's last SCAAP payment to Arizona appears to be based on an annual average criminal alien population of 2,642, whereas the actual average number of criminal aliens eligible for SCAAP in Arizona was 3,642 for that year.

Third, DOJ's per diem reimbursement of \$17.12 per inmate is about a third of Arizona's actual per diem costs of \$53.44. This is because DOJ's per diem figure is based solely on annual corrections officer salary costs, and not on such other essential costs as food, clothing and medical care for the inmates.

Pursuant to 8 U.S.C. § 1231(i)(1), I reiterate my request that at a minimum (and without prejudice to Arizona's rights to seek payment for sums owed but not paid in prior years), you comply with the requirements of the statute and enter into a contract with the State of Arizona to reimburse us for our actual average costs incurred in the incarceration of criminal aliens. Arizona's next SCAAP submittal will cover Arizona's fiscal year

2004 (the period from July 1, 2003 through June 30, 2004). During that period, our average daily SCAAP eligible population was 3,964. Applying the same actual per diem cost figures from the prior year (\$53.44), our SCAAP reimbursement should total \$77,320,198:

<u>Avg. Daily SCAAP population</u>		<u>Per diem cost</u>		<u>No. days</u>		<u>Amt. Due</u>
3,964	x	\$53.44	x	365	=	\$77,320,198

I am therefore submitting the State of Arizona's invoice in the amount of \$77,320,198 for DOJ's FY'04 SCAAP obligations.

In addition, I am also submitting the State of Arizona's invoice in the amount of \$40,602,376.00, representing the State's actual costs of incarcerating criminal aliens between July 1, 2004 and December 31, 2004. This is based on the following average daily SCAAP populations and per diem costs:

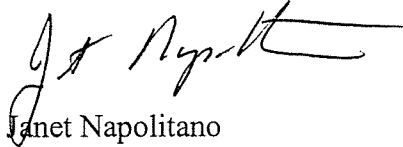
<u>Month</u>	<u>Avg. SCAAP pop.</u>		<u>Per diem cost</u>		<u>No. days</u>		<u>Amt. Due</u>
July	4102	x	\$53.44	x	31	=	\$6,795,537.28
August	4141	x	\$53.44	x	31	=	\$6,860,146.24
September	4155	x	\$53.44	x	30	=	\$6,661,296.00
October	4096	x	\$53.44	x	31	=	\$6,785,597.44
November	4126	x	\$53.44	x	30	=	\$6,614,803.20
December	4156	x	\$53.44	x	31	=	\$6,884,995.84
<b>TOTAL</b>							<b>\$40,602,376.00</b>

If you cannot, or will not, pay these costs, then I hereby make formal demand that the federal government take custody of the undocumented criminal aliens in our state prisons and incarcerate them. Please note that, among other things, we will continue to submit invoices to your office until this matter is satisfactorily resolved.

I would appreciate your response no later than February 24, 2005. In addition, I would like to meet with you in person to discuss this issue in the very near future. I will be traveling to Washington February 25 through March 1, 2005 for the National Governor's Conference. I would be pleased to meet with you during this time frame and to encourage other border state governors to do the same.

I am hopeful that this letter, and your new tenure, can spawn a serious, immediate and constructive discussion of ways to ameliorate this situation and reduce, if not eliminate, the State's overwhelming financial burden. Thank you for your prompt attention to this important issue. If you have any questions regarding this matter, please call me or my General Counsel, Tim Nelson, at 602-542-1586.

Yours very truly,

A handwritten signature in black ink, appearing to read "Janet Napolitano", with a stylized flourish at the end.

Janet Napolitano  
Governor

Enclosures